SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1150

DAVID M. GOODMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on December 16, 1966.

CITATIONS TO OPINION BELOW

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A hereto.

JURISDICTION

The opinion of the Court of Claims was rendered on December 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

On the appeal of a "veterans preference eligible" to the Civil Service Commission, have the rights of such veteran been denied in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and the provisions of 5 C.F.R. § 22.101, et seq., promulgated by the Commission under Section 14 of the Veterans Preference Act of 1944, where: (a) the chief witness against the employee was not present at the Commission hearing to testify, but rather the employing agency relied upon expurgated and blocked-out statements of that witness and refused to permit the employee to see the complete statements, although requested by the employee; (b) the employing agency refused to produce at the Commission hearing, for cross-examination, its employees, under its control and command, upon whose statements it relied before the Commission, and whose presence had been requested by the employee through the Commission; and (c) the employing agency relied upon unsworn statements of witnesses and statements of witnesses extracted from criminal proceedings to which the employee had not been a party.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution. Also involved are Section 14 of the Veterans Preference Act of 1966, 58 Stat. 390, 5 U.S.C. § 863, and Sections 22.101, et seq. of the Civil Service Commission Regulations, 5 C.F.R. §§ 22.101, et seq.

The constitutional provision, statute and pertinent portions of the regulations involved are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner is a veteran of World War II, who first began his employment with the Bureau of Customs in 1941. [Tr., Ct. Cls., p. 211] [1] After his military service, petitioner became a customs inspector, GS-8, with the Customs Service at the Port of New York. He continued in that position until November 7, 1957, when he was charged by his employing agency, the Bureau of Customs, with having improperly examined the baggage of one Carlo Parlato on October 15, 1956. [Tr., Ct. Cls., p. 211] The alleged improper baggage examination, according to the charge, was made after petitioner had been introduced to Domenico Guarna, and a Customs Inspector Lev, who allegedly arranged for the baggage inspection by petitioner. [App. A, p. A-43]

Petitioner responded to the charges by making a complete denial. [App. A, p. A-43] Petitioner was thereupon removed by the Bureau of Customs from his position as a customs inspector on December 8, 1957. Although he filed an appeal to the Civil Service Commission on December 11, 1957, the appeal was not heard until October 5, 1960, almost three years later. [App. A, pp. A-44, 48]

On June 11, 1958, petitioner submitted an affidavit to the Civil Service Commission in which he requested a hearing, and that he be furnished with the statements of Guarna and other witnesses who allegedly supported the charges against him. [Joint Ex. 1(d)A; App. A, p. A-44]

On May 2, 1960, the Customs Bureau submitted to the Civil Service Commission an unsworn statement by the Acting Commissioner of Customs relating to the facts and circumstances surrounding the charges against petitioner. [App. A, p. A-45] Submitted with the statement were a number of expurgated statements of witnesses,

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[1] Citations are to the original record in the court below, portions of which have been designated and certified to this Court.

teletypes, and extracts from two sworn statements by Guarna, a smuggler. [App. A, pp. A-45, 46] One of Guarna's statements was taken by Customs Service investigative agents on October 1, 1957, and the other on November 22, 1957. [Joint Exs. 1(a) 14, 20] Also submitted were extracts of testimony given in criminal proceedings in the trial of certain customs agents for alleged bribery and complicity in Guarna's smuggling operations. [App. A, p. A-45, 46]

In an affidavit of June 16, 1960, petitioner objected to the documents submitted to the Commission by the Customs Bureau on the grounds that the statements were extracts and incomplete. [App. A, p. A-47] He requested the presence of the Customs Bureau employees whose statements had been submitted to the Civil Service Commission and relied upon in justification of his dismissal. [Ibid.] In addition, petitioner requested to see the complete statements of Guarna. [Ibid.]

Customs decided that none of the employees requested would be produced at the hearing. [Ibid.] Of the complete Guarna affidavit of October 1, 1957, consisting of twenty-nine pages, only one page was shown to the petitioner. Portions of three pages of the November 22, 1957, Guarna sworn statement were blocked out. [Joint Exs. 1(d) 14, 20]

The only witness who testified for the Customs Service at the Commission hearing was a customs investigative agent who stated that no inconsistencies had been deleted from the two Guarna statements. [Joint Ex. 1(c) p. 46] In testimony in the Court of Claims, the same agent admitted there were many inconsistencies deleted from the two Guarna affidavits. [Ct. Cls. Tr., pp. 125, 127, 128, 130, 170, 171]

On December 27, 1960, the hearing examiner approved the removal of petitioner, and the Civil Service Commission Board of Appeals and Review affirmed on June 22, 1961. [App. A, pp. A-49, 50]

Petitioner then brought suit in the Court of Claims for loss of salary resulting from a violation of his constitutional and statutory rights, consisting of the use of expurgated and blocked-out statements of the chief witness against him, the refusal of the employing agency to produce witnesses who had been requested by the petitioner and who were Customs employees, and the use of the unsworn statements and the irrelevant material from the criminal proceedings to which petitioner had not been a party. The Court of Claims affirmed the dismissal.

REASONS FOR GRANTING WRIT

The principal question presented by this petition is whether a Government employee, a "veterans preference eligible", can be denied an opportunity to see the full contents of statements presented to the Civil Service Commission by the employing agency and relied upon in affirming the dismissal of the employee, in proceedings under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. § 863. An important subsidiary question also is presented by the interpretation by the court below of this Court's decision in *Williams v. Zuckert*, 371 U.S. 531, *case remanded for hearing on petition for rehearing*, 372 U.S. 765 (1963), in which this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Civil Service Commission hearing on his appeal where he has made a timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such attempt.

In the present case, the Civil Service Commission considered and relied upon expurgated, blocked-out and unsworn statements of the chief witnesses against petitioner. In affirming the employee's dismissal based upon a record consisting of those expurgated, blocked-out and unsworn statements of the chief witnesses, and refusing to permit the employee to see the full contents

of the statements of witnesses, and to have the employees of the employing agency present for the purpose of cross-examination, the Commission denied the procedural rights afforded to the employee under the Fifth Amendment, the Veterans Preference Act and the Commission's regulations.

In *Jencks v. United States*, 353 U.S. 657 (1957), this Court required the full disclosure of statements of a witness in criminal proceedings where the Government relied upon that witness in the criminal proceeding.

The reasoning in the *Jencks* case has been applied to administrative proceedings. *Communist Party of the United States v. Subversive Activities Control Board*, 254 F.2d 314, 327-328 (D.C. Cir. 1958), *aff'd* 367 U.S. 1 (1961); *Carlisle v. Rogers*, 262 F.2d 19 (D.C. Cir. 1958); *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403, 408 (2d Cir. 1958). *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956) (Immigration and Naturalization Service, Dept. of Justice); *Schere v. Christenberg*, 179 F. Supp. 900, 905-906 (S.D.N.Y. 1959)(Post Office Dept.). See also, *In re Kosuga*, 7 Ad. L. (2d Ser.) (Decisions) 379 (1957) (Dept. of Agriculture). See generally, Note, 57 Mich. L. Rev. 420 (1959); Note, 11 Stan. L. Rev. 297, 326-332 (1959); Note, 68 Yale L. J. 1409 (1959). Permitting the veterans preference eligible to see the full contents of statements used against him in a Commission proceeding is a fundamental of evidentiary fair play and the Veterans Preference Act clearly contemplates that the veteran be accorded a fair hearing, with a full opportunity to reply to the evidence against him.

Absent a claim of governmental privilege, which has not been asserted in this case, there is no possible justification for denying production of *all* of the witness' statement — not just the portion which the employing agency decides is "truthful." The *Jencks* rule is a necessary corollary to 5 C.F.R. § 22.603 (1958 Ed.) of the Civil Service Commission regulations providing for the

opportunity to introduce evidence at the Commission hearing and to cross-examine witnesses. Barred from seeing the full contents of accusatory statements, the veteran is deprived of information which could exonerate him, or, most importantly in a dismissal proceeding, could reflect on the severity of the punishment of dismissal, which is ruinous to the veteran, his family and his reputation.

The Civil Service Commission, moreover, in its regulations, has recognized the right of the veterans preference eligible to see the evidence against him. 5 C.F.R. § 22.401(c) (1958 Ed.), provides:

> Evidence available to both parties. Relevant representations should be discussed with both parties to the appeal and shall be available for review by them.

In its opinion, the court below interpreted this provision of the regulations to permit the blocking-out and expurgation of sworn statements of an important witness, not present for cross-examination at the Commission hearing, stating:

> [P]laintiffs were tried on the bases of the evidence presented and not on the bases of any information that was withheld. [App. A, p. A-16]

As this interpretation applied to the present case, it permitted the employing agency to withhold twenty-eight pages of a 29-page sworn statement given by a chief witness, Domenico Guarna, on October 1, 1957, and to block out the inconsistent portions of a later sworn statement taken on November 22, 1957, even though petitioner specifically demanded to see the witness' full statements. In the Findings of Fact portion of the opinion of the court below, the court described the relationship of the two sworn statements in the following manner:

> Guarna was questioned by the Bureau of Customs on a number of occasions. On October 1, 1957, and November 22, 1957, the Bureau took

> statements from him. *The Bureau felt that Guarna did not tell the complete truth on October 1, 1957, but believed that his statement of November 22, 1957, was truthful.* [App. A, p. A-22; emphasis added.]

Although petitioner made his requests well in advance of the Civil Service Commission hearing, through sworn affidavits to the Commission, to obtain the statements of the smuggler Guarna, the most critical witness against him, the employing agency revealed only one page of the 29-page sworn statement of October 1, 1957, and blocked out those portions of the sworn statement of November 22, 1957, which *it* felt were prejudicial or untruthful.

Under the decision of the court below, an employing agency may select those portions of a witness' statements which it deems to be "truthful," and the veteran may not explore the matter further, may not test one statement against the other, may not challenge the witness' credibility by the most obvious means available.

This Court has stated unequivocally that the right to see the evidence in administrative proceedings of this nature is fundamental.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where Governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. [*Greene v. McElroy*, 360 U.S. 474, 496 (1959); emphasis added.]

It was of obvious advantage to the smuggler and admitted perjurer, Guarna, to tell the customs investigating agents what he believed they wanted to hear, regardless of the truth. This is not a case where the employing agency refused to reveal portions of statements or documents upon the grounds of national security interests, protection of informants, pending criminal action, or any other legitimate reason. Rather, the employing agency sought to benefit from parts of statements which supported their action of dismissal, yet withheld from the employee portions of documents and sworn statements which showed inconsistencies in the stories related by the chief witness.

The only justification for the blocking out of the sworn statements of the witness given by the court below was that the deletions resulted in the exclusion of evidence which tended to show that the petitioner had been bribed. [App. A., p. A-45] If there was prejudicial material in the statements deleted, this fact did not justify the refusal of the employing agency to permit the veterans preference eligible to see the complete statements so that *he* could make the determination as to whether he would take the risk of presenting such prejudicial material in order to show that the witness had perjured himself. If there was a risk to run, it was a risk that the veterans preference eligible had a right to take. The employing agency could not unilaterally determine what was in the best interests of the veterans preference eligible in blocking out and deleting portions of statements of witnesses to be used and relied upon before the Civil Service Commission.

This Court has, in recent years, consistently held that an agency or the Civil Service Commission is bound by its own regulations with respect to the procedural rights afforded to the employee. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court construed the Interior Department regulation giving an employee the right "to

cross-examine any witness offered in support of the charges", as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee and upon which the employing agency relied.

In *Williams v. Zuckert, supra*, 371 U.S. 531, 372 U.S. 765, this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Commission hearing where he has made timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such an attempt. In the present case, petitioner submitted an affidavit to the Civil Service Commission on June 16, 1960, some four months prior to the Commission hearing, in which he requested the presence of employees of the Bureau of Customs, whose statements were relied upon by the Bureau before the Civil Service Commission. [App. A, p. A-47] The Bureau refused to produce any of the employees whose presence as witnesses had been requested. [Ibid.]

The court below interpreted this Court's decision in *Williams v. Zuckert* to require that the requested witnesses ". . . were the petitioners' principal adversaries, or that they had submitted briefs in rebuttal to the petitioners' testimony, or more importantly, that the witnesses were aware that their presence had been sought." [App. A, p. A-14][2] Such a personal request, as required by the court below under the *Williams* decision, would have been in vain, since the employing agency, who controlled the witness, had decided that it would produce none of the witnesses requested. The Acting Commis-

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[2] These requirements appear to be in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Studemeyer v. Macy*, 320 F.2d 797 (D.C. Cir. 1963) where it was held that the veteran's failure to contact the employees requested did not bar his right to the appearance of such witnesses if a demand had been made upon the employing agency for the appearance of the witnesses.

sioner of Customs testified in the court below that the decision not to permit any Customs Service employees requested by petitioner to appear at the Commission hearing probably was made by the Commissioner of Customs or himself "* * * and if we were so advised not to appear, then we would not." [Tr., Ct. Cls., p. 78] The witnesses requested were important. The unsworn statement by the Acting Commissioner of Customs was relied upon by the Civil Service Commission in its decision affirming the dismissal of the petitioner.

5 C.F.R. § 22.401(b) of the Civil Service Commission regulations provides:

> Evidence. Statements of witnesses shall be by affidavit when practicable, and relative to the adverse decision.

This Commission regulation is clear and unequivocal. The statements submitted by the petitioner to the Civil Service Commission were in affidavit form. Yet the statement submitted by the Acting Commissioner of Customs was unsworn, as were uncertified portions of testimony from a criminal proceeding. The unsworn statement of the Acting Commissioner was considered by the court below to be a "position" paper. [App. A, p. A-17] But in fact the statement contained many personal observations and related many purported facts as to the weight of baggage brought into the country, the value of merchandise, etc., all of which was not subject to cross-examination by the veterans preference eligible. [Joint Ex. 1(d)B, quoted in part at App. A, pp. A-46, 47] The regulation obviously is intended to afford the highest degree of reliability possible in an administrative proceeding where there are numerous statements of witnesses who are not present for cross-examination. In the present case, not only did the Customs Bureau refuse to have the witnesses present for cross-examination, but it relied upon an unsworn statement of an official relating to many facts and circumstances which were not within the

individual's personal knowledge. The veteran should have had the right to test this evidence through cross-examination of the witness.

The decision of the court below finding the use of such unsworn statements not to be error in an administrative proceeding relating to the right of a veterans preference eligible to a fair hearing before the Civil Service Commission under the Veterans Preference Act is contrary to the decisions of this Court since *Vitarelli v. Seaton, supra,* in which this Court stated:

> *[I]t should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities.* For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical restraints in the making of objections and in the tactical handling of his case which would not pertain in a case being tried before trained judges, *scrupulous observance of departmental procedural safe-guards is clearly of particular importance.* [359 U.S. at 540; emphasis added.]

The decision of the court below has given judicial approval to a Civil Service Commission hearing in which: (1) the Commission relied upon expurgated affidavits of a critical witness against the employee, denying the employee's request to see the blocked-out portions of the affidavits; (2) the employing agency refused the employee's request for the presence at the Commission hearing of those employees whose statements were relied upon by the employing agency, and (3) the Commission considered and relied upon unsworn statements of witnesses in violation of its own regulations that statements of witnesses shall be by affidavit, if practicable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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